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IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

- versus -

ANTHONY HILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The State of New York submits this reply brief in support of its petition for a writ of *certiorari*.

ARGUMENT

In his brief opposing *certiorari*, respondent asserts that this case does not present a federal question, that it is distinguishable from *Santobello v. New York*, 404 U.S. 257 (1971), and that it is distinguishable from the numerous federal circuit court decisions addressing the same questions at issue here. All of those arguments are unavailing.

To begin, as discussed on pages 15-17 of the State's *certiorari* petition, the decision of the New York Court of Appeals presents a federal question. The Court of Appeals termed the error a

"constitutional" defect and cited a precedent of this Court. In addition, the Court of Appeals cited state cases that turned on federal constitutional principles. Significantly, the New York courts have long intertwined federal and state constitutional law when evaluating the validity of plea bargains.

Respondent argues, citing *Cooper v. Morin*, 49 N.Y.2d 69, 424 N.Y.S.2d 168 (1979), that New York courts sometimes interpret due process rights more broadly under the state constitution than under the federal constitution. (*See* Opposition Brief: 3).[1] Respondent's reliance on *Cooper* is misplaced, for two reasons. First, *Cooper* did not discuss plea bargaining; it involved a class action lawsuit by pretrial detainees challenging a county jail's visitation policies and disciplinary rules. *Cooper* thus concerned matters far different from those at issue here.

Second, and more fundamentally, *Cooper* made a clear distinction between the state and federal due process protections afforded pretrial detainees. The court in *Cooper* discussed federal precedents at length and rejected the plaintiffs' federal due process claims. *See Cooper*, 49 N.Y.2d at 76-78, 424 N.Y.S.2d at 172-74. The court then separately addressed state constitutional precedents and held that the plaintiffs were entitled to some

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[1] Parenthetical references designated as "Petition" and "Opposition Brief" are to the State's petition for a writ of *certiorari*, and to respondent's brief in opposition, respectively.

relief under state law. The court expressly ruled that the state constitution afforded pretrial detainees greater protection than the federal constitution. *See Cooper*, 49 N.Y.2d at 78-82, 424 N.Y.S.2d at 174-77.

Here, in contrast, the Court of Appeals made no "plain statement" that respondent's challenge to his guilty plea would be evaluated differently under state and federal constitutional law. Instead, the court intermingled federal and state precedents -- again, as the New York courts have long done when applying the Due Process Clause to plea bargaining. This Court must presume, therefore, that the decision of the Court of Appeals rests on federal due process grounds. *See Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

Next, respondent's attempt to distinguish this case from *Santobello* fails. (*See* Opposition Brief: 8-13). Respondent merely repeats the erroneous conclusion of the Court of Appeals: that the failure to inform a defendant about post-release supervision (PRS) is a "fundamental defect" that cannot be remedied by specific performance. (Opposition Brief: 10). While respondent concedes that a "broken promise" can be remedied by specific performance, he asserts that there was no "broken promise" here. (*Id.*).

Respondent is wrong; a "broken promise" was the essence of this case. When he pleaded guilty, respondent was promised a prison sentence of 15

years, with no mention of PRS. He received, however, a sentence of 15 years in prison and 5 years of PRS. The promise of a 15-year "flat" sentence was therefore unfulfilled. The trial court remedied that error by resentencing respondent to 12 ½ years in prison and 2 ½ years of PRS, to fulfill his reasonable expectations under the bargain. Hence, like *Santobello*, this case involved a broken sentencing promise, which could be remedied by specific performance. (*See* Petition: 6-9)

Respondent notes that *Santobello* granted the state court discretion to choose the appropriate remedy: that is, to determine whether the circumstances warranted vacatur of the plea or specific performance. (*See* Opposition Brief: 12-13). But as explained on pages 8-9 of the *certiorari* petition, the Court of Appeals did not exercise that discretion here. Instead, the Court of Appeals held that the constitution *required* vacating respondent's plea. As discussed, that conclusion was incorrect. This Court should remand the case to the Court of Appeals so that it may exercise its discretion with full knowledge of the options.

Respondent's attempt to distinguish the federal circuit court decisions on point also fails. (*See* Opposition Brief: 13-15). As respondent does not dispute, federal circuit courts have held, uniformly, that the failure to advise a defendant of supervised release (the federal analog to PRS) is harmless, so long as the total sentence ultimately imposed (prison plus supervised release) does not

exceed the maximum prison term that the defendant was warned he could receive. (*See* Petition: 9-14).

Respondent does not deny that the New York Court of Appeals diverged from the holdings of every federal appellate case on point. He argues, however, that this split has no constitutional significance, because Rule 11(h) of the Federal Rules of Criminal Procedure permits harmless error review. (Opposition Brief: 13-15). This argument makes no sense. As discussed, the New York Court of Appeals held here that the constitution *forbids* harmless error review and *requires* vacatur of the plea. On the other hand, federal courts have discerned no constitutional problem with applying the harmless error doctrine to the same situation. The New York and federal courts are thus split over whether harmless error review is constitutionally permissible.[2]

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[2] Respondent also incorrectly asserts that the error at the plea colloquy here was not harmless. Respondent notes that he could receive an extra six months in jail if he were to violate his PRS near the end of his term of supervision. He argues, therefore, that he could spend more time in state custody than the promised 15 years. (*See* Opposition Brief: 15 n. 3). However, as explained on page 14 of the *certiorari* petition, it is irrelevant that respondent might serve additional jail time for a violation of his PRS. Any sentence that respondent might receive for violating his PRS would not be a direct consequence of his guilty plea. Instead, it would be punishment for an independent, voluntary act: respondent's willful violation of the terms of his release. *See, e.g., Duke v. Cockrell, 292 F.3d 414, 417* (5th Cir. 2002); *Warren v. Richland*

(Continued...)

Finally, contrary to respondent's assertion (Opposition Brief 5-8), this case is vitally important. As this Court has observed, plea bargaining is essential to the criminal justice system. *See Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system") (*quoting Blackledge v. Allison*, 431 U.S. 63, 71 (1977)); *Santobello*, 404 U.S. at 261 ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part").

A system that depends upon guilty pleas also depends upon the presumption that voluntary plea agreements will be enforced. If defendants can escape from agreed-upon sentences, prosecutors will have little incentive to make plea offers. The case at hand provides a perfect example. The State granted respondent a mid-trial plea bargain, after the victim (respondent's daughter) testified that respondent had raped and abused her over a period of six years. The State offered the bargain with the expectation that respondent would serve 15 years in prison and that the victim would not be forced to testify again.

(...Continued)

County Circuit Court, 223 F.3d 454, 457-58 (7th Cir. 2000); *Parry v. Rosemeyer*, 64 F.3d 110, 114 (3d Cir. 1995); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977). The sentence that respondent received as a result of his guilty plea -- 12 ½ years in prison and 2 ½ years of PRS -- comported with the plea agreement and in fact was less restrictive than the promised 15-year prison term. He thus received the benefit of his bargain.

In return, respondent avoided the prospect of an even lengthier sentence after trial. Notably, in accepting the bargain, respondent freely admitted his guilt.

Nevertheless, the Court of Appeals held that the State must retry respondent -- and force the victim to testify again -- even though the trial court ultimately imposed a less restrictive sentence than the one promised. This is theater of the absurd. The State would never have agreed to a mid-trial plea if it had any inkling that such a result could occur. Moreover, as a result of the decision of the Court of Appeals, even an inconsequential error in informing a defendant about the sentence will now never be harmless in New York State. This cannot be what "due process" requires.[3]

In sum, the New York Court of Appeals ignored the longstanding rule of, ironically,

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[3] As noted in the *certiorari* petition, the New York Court of Appeals vacated a guilty plea on the same erroneous ground in another recent case. *See People v. Van Deusen*, 7 N.Y.3d 744, 745-46, 819 N.Y.S.2d 854, 854-55 (2006). Contrary to respondent's contention (*see* Opposition Brief: 8), the State argued below that the decision in *Van Deusen* contradicted the holdings of every federal appellate case on point. (*See* State's Court of Appeals Brief: 29 n. 5). Of course, the State also attempted to distinguish *Van Deusen* from the present case, realizing that the Court of Appeals was unlikely to overrule its recent precedent. (*See id.*: 27-30). The critical issue here is that, in this entire line of decisions, the New York Court of Appeals ignored settled constitutional principles. This Court should correct that error before it spreads further.

Santobello v. New York. This Court should grant *certiorari* to correct that error and to resolve the split between the New York and federal courts. In addition, a reversal here would safeguard the plea bargaining system, which relies on the enforcement of voluntary bargains. Indeed, summary reversal would be appropriate, because the error was clear and there are no colorable arguments for affirmance.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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